United States Department of Labor
Employees' Compensation Appeals Board

S.W., Appellant	)	
and	)	**Docket No. 23-0513**
	)	**Issued: September 28, 2023**
U.S. POSTAL SERVICE, FORT DIX POST OFFICE, Fort Dix, NJ, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 1, 2023 appellant, through counsel, filed a timely appeal from a September 21, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the September 21, 2022 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to expand the acceptance of her claim to include additional right upper extremity conditions causally related to the accepted March 9, 2018 employment injury.

FACTUAL HISTORY

On March 12, 2018 appellant, then a 48-year-old custodian, filed a traumatic injury (Form CA-1) alleging that on March 9, 2018 she sprained her right knee, right elbow, right shoulder, and lower back when she slipped on a patch of ice and fell down onto her right arm, right shoulder, right hip, and right knee while in the performance of duty.[4] She stopped work on March 9, 2018 and returned to limited-duty work on March 12, 2018. By decision dated April 26, 2018, OWCP accepted the claim for cervical strain, lumbar strain, and contusion of the right elbow.

In a report dated May 4, 2018, Dr. Evan J. Conte, a Board-certified orthopedic surgeon, recounted appellant's complaints of right elbow pain after she slipped at work and sustained a direct blow to the posterior medial side of the right elbow. He indicated that she developed new symptoms over the past few weeks, including numbness and weakness of the small finger, ring finger, and right arm. On physical examination of the right upper extremity, Dr. Conte observed intact sensation to light touch except for decreased sensation in the ulnar nerve distribution and positive Tinel's sign at the medial epicondyle cubital tunnel area. He diagnosed right cubital tunnel syndrome and contusion of the right elbow.

A July 9, 2018 electromyography and nerve conduction velocity ((EMG/NCV) study demonstrated evidence of moderate-to-severe right ulnar nerve neuropathy at the elbow.

On October 24, 2018 appellant, through her attorney, requested the expansion of the acceptance of her claim to include right ulnar neuropathy.

By decision dated November 26, 2018, OWCP denied expansion of the acceptance of her claim to include right cubital tunnel syndrome and right ulnar neuritis. It found that the evidence of record did not demonstrate that the claimed medical conditions were related to the accepted March 9, 2018 employment injury.

On December 3, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on April 9, 2019.

By decision dated May 21, 2019, OWCP's hearing representative set aside the November 26, 2018 decision, and remanded the case for further development of the medical evidence.

[4] OWCP assigned the current claim File No. xxxxxx890. Appellant subsequently filed another Form CA-1 on May 18, 2019 alleging that on the same date she sustained a left hand and wrist injury while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx817 and accepted it for strain of muscle, fascia, and tendon of the left wrist and forearm. It has administratively combined OWCP File No. xxxxxx817 and OWCP File No. xxxxxx890, designating the latter as the master file.

OWCP subsequently referred appellant, along with a statement of accepted factors (SOAF) and series of questions, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination regarding whether appellant sustained additional right upper extremity conditions causally related to the accepted March 9, 2018 employment injury.

In a June 7, 2019 report, Dr. Askin reviewed appellant's history of injury and discussed her medical records. On physical examination, he observed tenderness to touch at the right medial epicondyle and positive Phalen's, Tinel's, and Roos tests on the right. Dr. Askin indicated that appellant's examination was consistent with carpal tunnel on the right, but there was no objective evidence of neuropathy or medial epicondylitis. He opined that the March 9, 2018 employment incident would not be a point of causation for appellant's "so-called cubital tunnel syndrome."

By decision dated July 9, 2019, OWCP denied expansion of the acceptance of her claim to include right cubital tunnel syndrome and right ulnar neuritis. It found that the weight of the medical evidence rested with the June 7, 2019 report of Dr. Askin.

On July 16, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on November 14, 2019.

Appellant submitted a September 3, 2019 EMG/NCV study, which revealed mildly prolonged median motor distal latencies, median sensory velocities, and evidence of bilateral mild carpal tunnel syndrome.

By decision dated January 23, 2020, OWCP's hearing representative set aside the July 9, 2019 decision and remanded the claim for OWCP to obtain a supplemental report from Dr. Askin.

In a February 4, 2020 supplemental report, Dr. Askin explained that carpal tunnel syndrome and medial epicondylitis could be the result of repetitive overuse or single exertion from a sports activity. He indicated that he reviewed the additional medical records, and opined that the March 9, 2018 employment injury did not cause any nerve injury.

By decision dated February 18, 2020, OWCP denied expansion of the acceptance of appellant's claim to include right cubital tunnel syndrome and right ulnar neuritis.

On February 24, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated April 14, 2020, OWCP's hearing representative set aside the February 18, 2020 decision, finding a conflict between the medical opinions of Dr. Conte, appellant's treating physician, and Dr. Askin, OWCP's referral physician, regarding whether appellant sustained additional right upper extremity conditions due to the accepted March 9, 2018 employment injury. The hearing representative remanded the case for OWCP to refer appellant for an impartial medical examination.

In August 2020 OWCP referred appellant, along with an updated SOAF and a series of questions, to Dr. Thomas O'Dowd, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), in order to resolve the conflict in medical opinion evidence regarding whether appellant's right cubital tunnel syndrome and lesion of the right ulnar nerve were causally related to the accepted March 9, 2018 employment injury. In an August 25, 2020 report,

Dr. O'Dowd described that on March 9, 2018 appellant slipped on ice while at work and injured her right elbow, right hip, lower back, and right knee. He indicated that she complained of her right elbow still bothering her and numbness in the ulnar nerve distribution on the right side. Upon physical examination of appellant's upper extremities, Dr. O'Dowd observed full range of motion of both elbows without any focal tenderness. Tinel's sign was slightly positive over the right ulnar nerve and there was decreased sensation in the right ulnar nerve distribution. Dr. O'Dowd noted that appellant's claim was accepted for cervical strain, lumbar strain, and contusion of the right elbow. He further reported: "[a]s a result of the contusion to the right elbow, she developed neuropractic injury to the ulnar nerve as a result of the direct blow to the right elbow." Dr. O'Dowd indicated that appellant's accepted conditions had resolved. He noted that the EMG/NCV abnormalities noted in the July 2018 report had resolved by the September 2019 EMG/NCV study.

Dr. O'Dowd noted his agreement with both Dr. Askin and Dr. Conte. He reported that the opinion of both physicians was "largely correct" and he believed that it was a "matter of definition." Dr. O'Dowd agreed with Dr. Askin that appellant did not have cubital tunnel syndrome, but noted that it could develop. He also indicated that he agreed with Dr. Conte that she had abnormalities to the ulnar nerve. Dr. O'Dowd opined that appellant did not develop "full-blown cubital tunnel syndrome which is a scarring or compression of the nerve as it passes through the cubital tunnel as described … by Dr. Askin." He concluded that she had a contusion and neuropractic injury to the right ulnar nerve at the elbow which has since resolved.

By decision dated July 28, 2021, OWCP expanded the acceptance of appellant's claim to include contusion of the right ulnar nerve at the elbow.

By separate decision dated July 28, 2021, OWCP denied expansion of the acceptance of appellant's claim to include the additional conditions of right cubital tunnel syndrome and right ulnar neuropathy causally related to the accepted March 9, 2018 employment injury.

On August 4, 2021 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on December 7, 2021.

By decision dated February 8, 2022, OWCP's hearing representative affirmed the July 28, 2021 decision.

Appellant subsequently submitted a January 7, 2022 report by Dr. Laura E. Ross, an osteopath and Board-certified orthopedic surgeon, who indicated that appellant was evaluated for complaints of right elbow and arm pain following a March 9, 2018 employment incident. On physical examination of the right elbow, Dr. Ross observed tenderness to palpation along the medial upper condyle, but no gross instability. She diagnosed medial epicondylitis of the right elbow with possible tearing of the flexor tendon attachment onto the medial epicondyle.

OWCP also received a February 5, 2022 right elbow magnetic resonance imaging (MRI) scan, which revealed mild osteoarthrosis of the right elbow, marked enlargement of the ulnar nerve at the level of the cubital tunnel, mild common extensor origin tendinosis with low-grade partial-thickness undersurface tear, mild common flexor/pronator origin tendinosis without tear, mild insertional biceps tendinosis without tear, and mild degeneration of the proximal radial collateral ligament without tear.

In a report dated March 22, 2022, Dr. William Wolfe, a Board-certified neurologist, described the March 9, 2018 employment injury and noted appellant's complaints of right medial elbow pain going down the medial forearm and numbness in the dorsal and palmar portion of the right palm. On physical examination of the right upper extremity, he observed positive Tinel's in the right ulnar groove and cubital tunnel. Dr. Wolfe reported that appellant had direct trauma to the right medial elbow (ulnar groove/cubital tunnel) with numbness and weakness in the ulnar distribution. He opined that appellant's injuries were directly attributable to the accident, which occurred on March 9, 2018.

On April 7, 2022 appellant underwent an EMG/NCV study, which showed right ulnar neuropathy at the elbow. In an April 7, 2022 report, Dr. Matthew McClure, a Board-certified physiatrist and rehabilitation specialist, discussed the findings from the recent EMG/NCV study and indicated that it reflected the presence of a right ulnar nerve entrapment at the level of the cubital tunnel.

In reports dated April 28 and July 5, 2022, Dr. Ross noted appellant's complaints of continued right wrist pain and swelling following a March 9, 2018 employment injury. She provided examination findings and diagnosed medial epicondylitis of the right elbow with partial tearing of the extensor tendon attachment onto the lateral epicondyle, exacerbation of mild arthrosis of the right elbow, insertional tendinitis of the right biceps, right cubital tunnel syndrome, and degenerative changes of the proximal radial collateral ligament of the right elbow. Dr. Ross recommended that appellant perform full-duty work.

On July 11, 2022 appellant, through counsel, requested reconsideration.

In an August 23, 2022 report, Dr. Ross indicated that appellant returned to the office for further evaluation of her right elbow and arm. She conducted an examination and diagnosed medial epicondylitis of the right elbow with partial tearing of the extensor tendon attachment onto the lateral epicondyle, exacerbation of mild arthrosis of the right elbow, insertional tendinitis of the right biceps, cubital tunnel syndrome, and degenerative changes of the proximal radial collateral ligament of the right elbow.

By decision dated September 21, 2022, OWCP denied modification of the February 8, 2022 decision.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[5]

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized

[5] *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

medical opinion evidence.[6] A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[7] Additionally, the opinion of the physician must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the specific employment factor(s) identified by the claimant.[8]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.[9] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[10] When a case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

The Board finds that this case is not in posture for decision.

In an August 25, 2020 report, Dr. O'Dowd described the March 9, 2018 employment injury and noted examination findings of slightly positive Tinel's sign over the right ulnar nerve and decreased sensation in the ulnar nerve distribution. He indicated that appellant's claim was accepted for cervical strain, lumbar strain, and contusion of the right elbow and reported that she developed "neuropractic injury to the ulnar nerve as a result of the direct blow to the right elbow." Dr. O'Dowd further reported that the opinions of both Dr. Askin and Dr. Conte were "largely correct." He opined that appellant did not develop "full-blown cubital tunnel syndrome," but sustained a contusion and neuropractic injury to the right ulnar nerve at the elbow, which had resolved.

The Board finds, however, that the report of Dr. O'Dowd, serving as the IME, lacked sufficient medical rationale to carry the special weight of the medical evidence.[12] Dr. O'Dowd

[6] *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

[7] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[8] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[9] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[10] 20 C.F.R. § 10.321.

[11] *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

[12] *See A.P.*, Docket No. 22-1092 (issued November 8, 2022); *V.K.*, Docket No. 19-0422 (issued June 10, 2020).

indicated that both Dr. Askin and Dr. Conte were correct and indicated that appellant did not have "full-blown cubital tunnel syndrome." The Board finds that Dr. O'Dowd's opinion is equivocal and speculative as he did not definitely opine on whether the accepted March 9, 2018 employment injury caused additional right upper extremity conditions.[13] The Board has held that medical opinions which are equivocal or speculative are of diminished probative value.[14] Accordingly, the Board finds that Dr. O'Dowd's opinion lacks the specificity and detail needed to carry the special weight of the medical evidence.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.[15] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[16] Once OWCP undertakes development of the record, it must procure medical evidence that will resolve the relevant issues in the case.[17] In a situation where OWCP secures an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification and/or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[18] For the above-described reasons, the opinion of Dr. O'Dowd requires clarification. Therefore, in order to address the unresolved conflict in the medical opinion evidence, the Board will remand this case to OWCP for a supplemental opinion regarding whether appellant sustained additional right upper extremity conditions, causally related to the accepted March 9, 2018 employment injury. On remand, OWCP should also refer the new medical reports dated January 7 through August 23, 2022 to Dr. O'Dowd for review. If Dr. O'Dowd is unable to clarify his opinion or if his requested supplemental report is insufficiently rationalized, OWCP must submit the case record and a detailed SOAF to a new IME for the purpose of obtaining a rationalized medical opinion on the issue.[19] Following this and any other such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

[13] *R.T.*, Docket No. 20-0081 (issued June 24, 2020); *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *F.D.*, Docket No. 18-1596 (issued June 18, 2019).

[14] *T.M.*, Docket No. 19-1414 (issued February 12, 2020); *S.R.*, Docket No. 16-0657 (issued July 13, 2016); *Minnie Cook*, Docket No. 99-1848 (issued December 20, 2000).

[15] *See D.T.*, Docket No. 20-0234 (issued January 8, 2021); *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

[16] *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[17] *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

[18] *M.W.*, Docket No. 21-1260 (issued September 9, 2022); *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *James P. Roberts*, *supra* note 11.

[19] *T.C.*, Docket No. 20-1170 (issued January 29, 2021); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Harold Travis*, 30 ECAB 1071 (1979).

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 28, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board